No. 87-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1981 encompass a claim of racial discrimination in the terms and conditions of employment, including a claim that petitioner was harassed because of her race?

2. Did the district court err in instructing the jury that for petitioner to prevail on her claim of discrimination in promotion she must prove that she was more qualified than the white person who received the promotion?•

• All parties in this matter are set forth in the caption.

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CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 805 F.2d 1143 and is set out in the Appendix to the Petition for Writ of Certiorari (Pet. App.) at pages 1a-20a. The order of the court of

appeals denying rehearing is set out in that Appendix at pages 21a-22a. The oral ruling of the district court granting in part respondent's motion to dismiss is unreported and is set out in the Petition Appendix at pages 23a-25a. The judgment of the district court dismissing the case based on the jury's verdict is set out in the Petition Appendix at pages 26a-28a.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1986. Pet. App. 1a. The court of appeals entered an order denying a timely petition for rehearing en banc on March 19, 1987. Pet. App. 22a. On June 5, 1987, Chief Justice Rehnquist entered an order extending the time for filing a Petition for a Writ of Certiorari to and including July 17, 1987. The Petition for a Writ of Certiorari was filed on July 17, 1987, and was granted on October 5, 1987. The

jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1981, which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R. S. § 1977).

STATEMENT OF THE CASE

This is an action under 42 U.S.C. § 1981, to redress discrimination in employment on the basis of race.

Petitioner, Brenda Patterson, was employed by respondent, McLean Credit Union, from May, 5, 1972, until July 19,

1982. TR[1] 1-20, 1-50. During that time period, McLean Credit Union provided savings and loan services for employees of McLean Trucking Company. TR 3-79 to 3-80, 4-20 to 4-21. McLean employed between eight and ten "general office" employees, including tellers, secretaries and accounting clerks, as well as several other supervisors, managers and professional employees. TR 3-82 to 3-83.

During Patterson's employment, Robert Stevenson served as President and General Manager of the Credit Union. TR 3-79. Stevenson made all of the company's major personnel decisions governing the general office workers, including hiring, firing and salary levels. TR 3-81 to 3-82, 3-123 to 3-124, 4-7.

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[1]References are to Transcript of Trial, November 12, 13, 14, 15, 18, 1985.

Brenda Patterson was hired by Stevenson as an accounting clerk. TR 2-115 to 2-116. Her primary responsibility was filing, although she occasionally served as a backup teller. TR 1-98 to 1-120. During her pre-employment interview Stevenson informed Patterson "that I was going to be working with all white women ... and that probably they wouldn't like me because they weren't used to working with blacks." TR 1-19. Stevenson himself testified: "I also had no experience working with black people, and from the very beginning I tried to counsel with Brenda." TR 3-97.

Throughout the time she worked at McLean Credit Union, Patterson was subjected to abusive and demeaning terms and conditions of employment. Unlike the other clerical workers, who were white, Patterson was assigned to dust and sweep

the office. TR 1-31. Patterson was constantly scrutinized and criticized in a manner not practiced with respect to the white office workers. Stevenson frequently stood near Patterson's desk, staring at her for several minutes at a time. TR 1-38 to 1-39, 1-90 to 1-91. This close observation, which was not given to white clerical employees, made Patterson nervous and disturbed her concentration on her work. TR 1-38 to 1-39, 2-134 to 2-135.

When white employees made mistakes, they were counselled in private, individual conferences with their supervisor. TR 1-40. However, when Patterson made an error, she was singled out and criticized by name in group staff meetings. TR 1-40 to 1-41, 1-89 to 1-90.

Throughout her employment, Patterson was given an oppressive work load, much in excess of that of her white co-

workers. TR 1-27 to 1-29, 1-81 to 1-83, 1-85 to 1-87. She was required to help white clerical workers with their tasks, but no one was ever assigned to help Patterson. TR 1-37 to 1-38, 1-87, 2-129. Even when her immediate supervisor timed her tasks and determined that Patterson had too much work to do, Stevenson continued to add tasks. TR 1-85 to 1-87, 1-126 to 1-127, 2-126 to 2-128. He then criticized Patterson for her alleged "slowness." When Patterson complained about the amount of work, Stevenson replied: "Well, blacks are known to work slower than whites by nature." TR 1-88.

Company witnesses did not deny this general policy of racial discrimination. In fact, Patterson's supervisor, testifying on behalf of the company, confirmed that Stevenson had stated on numerous occasions that he was not interested in hiring blacks and that the

company's Vice-President and Secretary was aware of Stevenson's attitude. TR 4-89, 4-49. Stevenson's attitudes toward black workers is also revealed in remarks he made to another supervisor. In 1980, this supervisor, Warren Behling, recommended a black candidate for the position of computer operator. After Stevenson had met the applicant, he telephoned Behling to ask: "why the hell didn't you tell me this person was black?" TR 2-161. Behling replied that he did not think that it mattered. Id. Stevenson then stated: "Well it does. We don't need any more problems around here." Id. Stevenson further commented: "We will interview this person but we will not hire him and we will search for additional people who are not black." Id. A less qualified white worker was subsequently hired into the computer

operator position. TR 2-162.[2]

During the entire period that Patterson worked at McLean Credit Union, all of the supervisors were white. TR 1-29, 3-128 to 3-129. In the thirty-two years that Stevenson worked there, the Company employed only a total of three black workers. TR 3-125 to 3-126, 3-128 to 3-129, 3-195 to 3-196, 4-90. All three of these black workers were given filing jobs. TR 2-115 to 2-116, 3-127. When secretarial or bookkeeping positions opened, white workers were hired or promoted into the positions, while the black workers remained in the file room. TR 4-11 to 4-12.

When she was hired at McLean Credit Union, Patterson told Stevenson that she would accept an entry-level file clerk job, but that she was interested in

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[2]See also TR 1-44 to 1-45 (black job applicant told "he can just forget it").

advancing to bookkeeping or secretarial positions. TR 1-22 to 1-23. Yet, the company did not post job opportunities and Patterson was never able to find out about promotion opportunities until after the decisions had been made. TR 1-45 to 1-46, 1-91 to 1-92, 3-162 to 3-164. Several white workers with less education, less seniority and less experience than Patterson were hired or promoted into secretarial and bookkeeping positions, while Patterson was not. TR 1-92 to 1-96. In each case, the selection of workers to hire and promote was made by Stevenson and the other white supervisors on the basis of their subjective judgments. TR 1-46, 1-92.

In 1974, Susan Williamson, a white woman, was hired into the position of accountant junior, a bookkeeping position. TR 3-105 to 3-106. Patterson, who had been working as an accounting

file clerk for two years, was never given the opportunity to apply for or transfer to the accountant junior position. TR 1-45 to 1-46, 1-91 to 1-92. In 1982, Williamson was promoted into the job of accountant clerk intermediate. TR 3-100, 4-69. Again Patterson had no knowledge of the vacancy and no opportunity to apply. TR 1-46 to 1-47.

Patterson was a college graduate with more formal education and more seniority than Williamson. TR 1-11 to 1-12, 1-21, 1-47 to 1-48. Prior to her promotion, Williamson was given on-the-job training in the duties of the accountant intermediate position. TR 1-48 to 1-49, 3-187 to 3-188. This training was not available to Patterson. Id. One of Williamson's supervisors testified that Williamson did not grasp accounting functions, TR 2-190, and that she was more interested in doing her

crocheting and reading her magazines than in doing her job. TR 2-191. This supervisor testified that the quality of Williamson's work was below average. TR 2-159.

In 1982, during her last year of employment with McLean Credit Union, Patterson was denied a merit increase in her salary that was given to white employees. TR 2-129 to 2-130. Patterson's supervisor testified that this increase was denied because of Patterson's attitude problems. TR 4-46. However, Patterson's annual evaluation, prepared by the same supervisor one month earlier, indicated that Patterson's attitude was above average, and included the comment "Actually Goes Out [of her] Way To Be Pleasant With Everyone." TR 1-63 to 1-64, 4-57 to 4-58, 4-61.

On July 19, 1982, Patterson was laid off and subsequently terminated.

TR 1-50. White employees with less seniority than Patterson were retained. TR 1-57 to 1-58.

District Court Proceedings

Patterson brought this lawsuit against McLean Credit Union on January 25, 1984, in the United States District Court for the Middle District of North Carolina. Patterson alleged that the company was liable under 42 U.S.C. § 1981, for subjecting her to racial harassment and discriminating against her on the basis of her race with respect to promotions and layoffs. JA 7-9. The alleged racial harassment included subjecting plaintiff to racial slurs, assigning her excessive work and denying her a merit increase in her salary. Id. In addition, plaintiff alleged, under pendent jurisdiction, the state tort action of intentional infliction of mental and emotional distress. JA 15.

The case was tried before a jury from November 12 to November 18, 1985. After the presentation of the plaintiff's evidence, the district court ruled that section 1981 does not provide a remedy for racial harassment by the employer. Pet. App. 23a-25a. The court dismissed all of the claims except the claim of discrimination in the promotion of Susan Williamson and in the layoff and subsequent dismissal of Patterson. The court thus dismissed Patterson's claims under section 1981 of racial harassment and salary discrimination, as well as the state law claim of intentional infliction of mental and emotional distress. Pet. App. 24a-25a.[3]

At the close of all of the evidence, the district court denied the defendant's motion for a direct verdict on the

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[3]The district court's ruling dismissing the state tort claim is not before the Court.

promotion claim. TR 3-46 to 3-51, 3-76. However, the court instructed the jury that to prevail on the promotion claim, plaintiff had to prove that she was more qualified for the position than was Susan Williamson, the white employee who received the job.[4] The court charged the

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[4]The district court instructed the jury on the promotion claim as follows:

> In order to carry her burden on [the promotion claim], the plaintiff must establish (1) that a promotion was in fact given to Susan Howard Williamson; (2) that the plaintiff had expressed an interest in the promotion, plaintiff may satisfy this requirement by showing that she had expressed a general interest in advancing as opportunities arose within the credit union; and (3) that plaintiff was better qualified for the position received by Susan Howard Williamson than was Susan Howard Williamson; and (4) that plaintiff was denied the promotion because of her race.
>
> ...
>
> With regard to the fourth
> (continued...)

jury that, in addition to proving that "McLean's intentional discrimination against her because of her race was the real reason that she did not receive the promotion," Patterson had to prove that she was better qualified than was Susan Williamson for the position that Williamson ultimately received. JA 42-43.

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[4](...continued)
requirement, plaintiff offered evidence tending to show that she had not been trained for the job of accountant intermediate because of her race and was thus denied the promotion because of her race.

JA 40-41 (emphasis added).

The court later charged:

> [I]t is necessary that [plaintiff] satisfy you by a preponderance of the evidence that she was more qualified to receive the promotion to the accountant intermediate position than was Susan Howard Williamson and that McLean's intentional discrimination against her because of her race was the real reason that she did not receive the promotion.

JA 42-43 (emphasis added).

The court explained this instruction:

> ... the law in the Fourth Circuit seems to be that in order to make out a prima facie case, you must show that you are better qualified than the person who received [the promotion], and I have so instructed the jury.

JA 71. Plaintiffs' counsel specifically objected to this part of the charge. Id. The jury returned a verdict in favor of the defendant employer and the district court dismissed the case in its entirety. Pet. App. 26a-28a.

Court of Appeals Proceedings

The United States Court of Appeals for the Fourth Circuit affirmed the district court. The Fourth Circuit held that section 1981 covers racial discrimination only in hiring, firing and promotion, since those matters "go to the very existence and nature of the employment contract." Pet. App. 8a. Characterizing section 1981 as a "more narrow prohibition" than Title VII, the

court ruled that racial harassment relates to the terms and conditions of employment and, therefore, does not abridge the right to make and enforce employment contracts that is conferred by section 1981. Pet. App. 8a-9a.

The Fourth Circuit also held that the jury charge on the promotion claim was proper. The court noted that this case involves a situation in which "an employer had advanced superior qualification as a legitimate nondiscriminatory reason for favoring another employee over the claimant." Pet. App. 19a. Relying on Fourth Circuit precedents,[5] the court ruled that in this situation, "the burden [is] upon the claimant to prove her superior qualifications." Pet. App. 19a-20a.

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[5] Young v. Lehman, 748 F.2d 194, 197-198 (4th Cir. 1984); Anderson v. Bessemer City, 717 F.2d 149, 154 (4th Cir. 1983), rev'd, 470 U.S. 564 (1985).

A timely petition for rehearing and suggestion for rehearing en banc was denied. Pet. App. 21a-22a.

SUMMARY OF ARGUMENT

I. Racial discrimination in the terms and conditions of employment, including racial harassment and salary discrimination, interferes with the right to make and enforce contracts and discourages the exercise of this protected right. Last Term, the Court reaffirmed that the right to make and enforce contracts "may not be interfered with on racial grounds, Goodman v. Lukens Steel Co., 482 U.S. __, 107 S.Ct. 2617, 2621 (1987), and that section 1981 forbids all racial discrimination in the making of private as well as public contracts," Saint Francis College v. Al-Khazraji, 481 U.S. ___, 107 S.Ct. 2022, (1987). The Court in Goodman upheld findings that toleration of a pattern of racial

harassment of employees violated section 1981. Id. Also last Term the Court held that racial harassment and vandalism of a synagogue violated the owner's rights under 42 U.S.C. § 1982 to purchase and hold property. Shaare Tefila Congregation v. Cobb, 481 U.S. ___, 107 S.Ct. 2019 (1987).

These recent decisions follow a long line of cases interpreting section 1 of the Civil Rights Act of 1866 to prohibit racial discrimination that interferes with, or discourages the exercise of, the right to contract or to purchase and lease property.[6] For example, in Tillman v. Wheaton Haven Recreation Association, 410 U.S. 431, 437 (1973), the Court held

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[6]Jones v. Mayer Co., 392 U.S. 409 (1968); Tillman v. Wheaton Haven Recreation Ass'n, 410 U.S. 431 (1973); Johnson v. Railway Express Agency Inc., 421 U.S. 454 (1975); Runyon v. McCrary, 427 U.S. 160 (1976); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).

that 42 U.S.C. § 1982 prohibits discrimination with respect to the entire "bundle of rights for which an individual pays when buying or leasing" property.

The Court's rulings that section 1981 prohibits "all racial discrimination ... with respect to" the right to make and enforce contracts, Jones v. Mayer Co., 392 U.S. 409, 436 (1968), are firmly grounded in the plain language of section 1981 and the legislative history of the provision. Section 1981 guarantees to black persons the "same" right to make and enforce a contract as is afforded to white persons. The lower court's limitation of section 1981's coverage to hiring, firing and promotion means that the only right that is protected is the right to make a contract on unequal terms.

The legislative history of section 1981 shows that Congress in 1866 was not

primarily interested in protecting blacks from discrimination in hiring, firing and promotion. The former slaveowners in the Reconstruction Era were all too eager to hire and retain black labor. These southern planters devised schemes to continue employing black labor under the same onerous terms and conditions that prevailed prior to emancipation. The Black Codes did not prevent freedmen from entering into contracts. Instead, they imposed detailed, draconian terms and conditions of employment. Congress intentionally drafted a broad and comprehensive provision, directed at a variety of practices, including the harsh treatment of black workers, refusals to pay black workers, conspiracies to fix a maximum wage for black labor, and laws that allowed black employees to be whipped and compelled them to work from "sunrise to sunset." The Fourth

Circuit's limitation of section 1981's scope would exclude from coverage most of the problems that the provision was intended to address.

Section 1981's coverage of discriminatory terms and conditions of employment, such as racial harassment, is important because section 1981 provides remedies not available to plaintiffs under Title VII. Compensatory and punitive damages are particulary appropriate as a remedy for racially discriminatory working conditions. Such violations often are egregious, and yet may not result in a significant backpay award under Title VII. Section 1981's protection from discriminatory terms and conditions of contract also is important in areas such as private education, where many institutions and programs are not covered by any other federal anti-discrimination statute.

Because section 1981 provides a cause of action to remedy discriminatory terms and conditions of employment, plaintiff's claims of racial harassment and salary discrimination were improperly dismissed.

II. A plaintiff may prove that she was denied a promotion on the basis of race without establishing that her qualifications are superior to those of the person selected for the promotion. Even when the employer articulates the selectee's superior qualifications as the reason for its decision, the plaintiff's proof that the employer's reason is pretextual may "take a variety of forms." Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978).

For example, the plaintiff could show that the employer did not actually rely on comparative qualifications by introducing evidence that the employer

was not aware of the candidates' qualifications at the time the decision was made, that the employer did not actually consider the plaintiff for the job or that the employer normally made promotions on the basis of seniority. In addition, the plaintiff could introduce direct or circumstantial evidence from which the factfinder could conclude that the employer had a policy of racial discrimination. The jury instruction in this case, charging that plaintiff had the burden of proving that she was more qualified than the white person who received the promotion, prevented the jury from considering whether the totality of plaintiff's evidence established discriminatory intent.

It follows from the fact that proof of superior qualifications is not necessary for the plaintiff to prevail on the merits that such proof is not

necessary to establish a prima facie case. The Court's precedents make clear that the plaintiff need only show that she met the minimum qualifications for the job in order to meet the "qualifications" element of the prima facie case. Alternatively, the plaintiff can make out a prima facie case through introduction of direct or circumstantial evidence of a policy of racial discrimination.

ARGUMENT

I.

SECTION 1981 PROVIDES A CAUSE OF ACTION FOR RACIAL DISCRIMINATION IN THE TERMS AND CONDITIONS OF EMPLOYMENT

A. The Court Has Repeatedly Recognized That Section 1981 Prohibits All Racial Discrimination Affecting the Right to Contract

The Fourth Circuit's "narrow" reading of section 1981, to protect against discrimination only in hiring, firing and promotion, is inconsistent with the Court's repeated rulings that

section 1981's scope is broad and comprehensive. Just this past Term, the Court specifically indicated that section 1 of the 1866 Civil Rights Act covers racial discrimination that interferes with the enjoyment of contract rights. In Goodman v. Lukens Steel Co., 482 U.S. ___, 107 S.Ct. 2617 (1987), the Court upheld findings that section 1981 had been violated by, inter alia, toleration by both the employer and the union of racial harassment of black employees. The Court concluded that under section 1981, the right to make and enforce contracts "may not be interfered with on racial grounds." Id. at 2621.[7] And in Saint

[7]In a dissenting opinion addressing a statute of limitations question, three members of the Court explicitly concluded: "Section 1981 banned racial discrimination in contractual relations, whether individuals were expressly or constructively denied the right to contract because of race, or were provided a lesser opportunity than others, in the form of less favorable

(continued...)

Francis College v. Al-Khazraji, 481 U.S. ___, 107 S.Ct. 2022 (1987), the Court reaffirmed the holding of prior cases that section 1981 "forbid[s] all 'racial' discrimination in the making of private as well as public contracts." (Emphasis added). Also last Term, the Court construed 42 U.S.C. § 1982, the parallel provision to section 1981 that protects the right to purchase and lease property, to encompass a claim of desecration of a synagogue. Shaare Tefila Congregation v. Cobb, 481 U.S. ___, 107 S.Ct. 2019 (1987).[8]

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[7](...continued)
contract terms or unequal treatment, discouraging entry into contractual relations." Goodman v. Lukens Steel Co., 107 S.Ct. at 2627, n. 4 (1987) (Brennan, J., joined by Marshall & Blackmun, JJ., concurring in part and dissenting in part).

[8]Both § 1981 and § 1982 derive from § 1 of the Civil Rights Act of 1866. In language parallel to that of § 1981, § 1982 guarantees "the same right ... as is enjoyed by white citizens ... to inherit, purchase, lease, sell, hold, and
(continued...)

Last Term's decisions are the most recent in a consistent line of cases construing section 1 of the Civil Rights Act of 1866. These cases uniformly recognize that section 1 encompasses racial discrimination that discourages exercise of the right to contract or to purchase property. For example, in Tillman v. Wheaton Haven Recreation Association, 410 U.S. 431, 437 (1973), the Court construed section 1982 to prohibit discrimination with respect to the entire "bundle of rights for which an individual pays when buying or leasing" property. In that case, the right to join a neighborhood swimming pool was held to be part of the right to "purchase

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[8](...continued)
convey real and personal property." "In light of the historical interrelationship between § 1981 and § 1982," the Court has in the past "found no reason to construe these sections differently." Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 440 (1973).

... property," even though membership rights in the swimming pool "could neither be leased nor transferred incident to the acquisition of property." Id. at 435. The Court reasoned that the right of blacks to purchase homes in the neighborhood was "abridged and diluted" by the recreation association's refusal to provide them the membership opportunities afforded to white property owners. Id. at 437.

In both Shaare Tefila and Tillman, the plaintiffs already owned the property at issue. Neither the vandalism of the synagogue nor the denial of the right to join a swimming pool club resulted in an absolute barrier to the plaintiffs' ability to "purchase" or "hold" property. Rather, these deprivations "diluted" the right to purchase property, just as subjecting a black worker to onerous terms and conditions of employment

"dilute[s]" the right to make an employment contract.[9]

In Jones v. Mayer Co., 392 U.S. 409, 423-24 (1968), the Court, in holding that section 1982 reaches private actions, concluded that section 1982 protects property rights against "interference from any source whatever." (Emphasis added). "It is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein ...." Id. at 436 (emphasis added). In Johnson v. Railway

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[9]The Court's analysis of section 1982 in Tillman is directly applicable to the coverage of section 1981. In Tillman the Court also ruled that the rights of white pool members to make and enforce a contract under section 1981 were violated by the pool's exclusion of the members' black guests. 410 U.S. at 439-440. Clearly, the ability to bring a black guest is an incidental term of the membership contract, similar to the right to be free from racial harassment.

Express Agency Inc., 421 U.S. 454, 459-60 (1975), the Court confirmed that section 1981 "affords a federal remedy against discrimination in private employment on the basis of race." Significantly, the employment discrimination claims in the Johnson case did not primarily involve hiring, firing[10] or promotion. Rather the issues raised in that case--seniority rules, job assignments and racial segregation[11] -- like those raised by Mrs. Patterson, concerned the terms and conditions of employment.

The broad scope of section 1981's prohibition against all types of discrimination was reiterated in Runyon v. McCrary, 427 U.S. 160 (1976), and McDonald v. Santa Fe Trail Transportation

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[10]After the EEOC charge was filed, the plaintiff in Johnson was fired and subsequently amended his charge to allege discriminatory discharge.

[11]See 421 U.S. at 455.

Co., 427 U.S. 273 (1976). In Runyon, the Court ruled that section 1981, like section 1982, covers private as well as governmental actions. The Court relied upon the fact that section 1982 guarantees the right of blacks "to purchase property on equal terms with whites." 427 U.S. at 170 (emphasis added). The court concluded that "a Negro's [§ 1981] right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees," id. at 170-71. The McDonald decision, holding that section 1981 protects white persons as well as black persons, concluded that "the terms of the bill prohibited any racial discrimination in the making and enforcement of contracts ...." 427 U.S. at 288.

In Memphis v. Greene, 451 U.S. 100, (1981), the Court reconfirmed that section 1 of the 1866 Act prohibits race-based interference with the enjoyment of protected rights. The Court concluded that section 1982 protects "not merely the enforceability" of property rights, but also the "right to acquire and use property on an equal basis with white persons." Id. at 120. The Court noted that actions which "hamper ... the use of ... property" might violate section 1982. Racial harassment and salary discrimination obviously "hamper" the enjoyment of an employment contract. The Court's precedents leave no doubt that discrimination in the terms and conditions of employment, including racial harassment and salary discrimination, are prohibited by section 1981.

Except in the Fourth Circuit, the

lower federal courts have unanimously concluded that discrimination in the terms and conditions of employment is actionable under section 1981.[12] The lower federal courts have also recognized causes of action under section 1982 to remedy conduct that discourages or interferes with the right to purchase and lease property.[13]

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[12] Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372, 1380 (7th Cir. 1986); Hunter v. Allis-Chalmers, 797 F.2d 1417, 1421 (7th Cir. 1986); Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986); Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986); Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985); Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250, 1254-57 (6th Cir. 1985), cert. denied, 106 S.Ct. 1197 (1986); Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1233 (D.C. Cir. 1984); Block v. R.H. Macy & Co., 712 F.2d 1241 (8th Cir. 1983); Lucero v. Beth Israel Hospital, 479 F. Supp. 452, 453-55 (D. Colo. 1979).

[13] See e.g., McDonald v. Verble, 622 F.2d 1227 (6th Cir. 1980)(section 1982 prohibits "subtle racial discrimination [in housing] sales efforts" even where

(continued...)

The Court's prior decisions do not distinguish, and there is no basis for a distinction, between explicit and implicit conditions of a contract. Discriminatory conditions to the employment contract, were they known at the outset of the contractual relationship, would surely discourage black individuals from entering into an employment contract and thus deprive them of an equal right to make such contracts. The fact that discriminatory terms and conditions of employment are not stated

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13(...continued)
there was no denial of sale); Clark v. Universal Builders, 501 F.2d 324, 330 (7th Cir.), cert. denied, 419 U.S. 1070 (1974)(section 1982 prohibits offering blacks less favorable terms and conditions than those offered to whites); Newbern v. Lake Lorelei, 308 F. Supp. 407, 414 (S.D. Ohio 1968) ("discrimination in the modes of negotiation" violates section 1982). But see Saunders v. General Services Corp., Slip Op., Civ. No. 86-0229-R (E.D. Va. 1987), appeal pending, No. 87-2175 (4th Cir.)(section 1982 covers only outright refusals to sell or lease).

at the outset and are not put into a written document does not lead to a different result. The employer's actions establish that these are implicit conditions of the contract which are different for black employees than for white employees, thus depriving black employees of an equal right to make and enforce an acceptable employment contract. The Court recognized this in both Johnson v. Railway Express, 421 U.S. at 455, and Goodman v. Lukens Steel, 107 S.Ct. 2617, in upholding a cause of action for discriminatory terms and conditions of employment that were not included in any written employment contract.

B. The Plain Language of Section 1981 Prohibits Racial Discrimination in the Terms and Conditions of an Employment Contract

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right

... to make and enforce contracts ... as is enjoyed by white citizens." The plain language of section 1981 makes clear that the statute protects against racial discrimination in the terms and conditions of employment contracts. Under section 1981, persons of all races are guaranteed the "same" right to make and enforce contracts. A contract of employment is merely a combination of many terms and conditions. E.g. Restatement (Second) of Contracts §§ 5, 224 (1981). A contract for employment either explicitly or implicitly covers at least the fact of employment, the nature of the work, the salary, the working hours, the work rules and penalties for violations thereof, and the location of the job. As the Court noted in Hishon v. King & Spaulding, 467 U.S. 69, 74 (1984):

> Because the underlying employment relationship is

> contractual, it follows that the "terms, conditions, or privileges of employment" clearly include benefits that are part of an employment contract.

Under the Fourth Circuit's interpretation of section 1981, some terms of the employment contract, such as the fact of employment and the opportunity for promotion, must be provided on a non-discriminatory basis. However, discrimination in other terms and conditions, such as salary, working conditions, and job duties, is not covered by section 1981. This reasoning converts section 1981's guarantee of the "same" right to make a contract into a guarantee of a "different" right to make a contract.

C. Protection Against Discrimination in the Terms and Conditions of Employment Is Mandated by the Broad Purpose of Section 1981

Section 1981 was first enacted as part of section 1 of the Civil Rights Act

of 1866. In enacting section 1981, Congress intended to prevent and remedy widespread schemes to force black workers to labor under onerous terms and conditions. In fact, Congress' major concern was exactly opposite of that ascribed to section 1981 by the Fourth Circuit. The ability of black workers to obtain or retain employment was not the primary problem. Rather, the problem was to enable black workers to obtain fair terms and conditions of employment.

"Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves," McDonald v. Santa Fe, 427 U.S. at 296. Nonetheless, a major impetus for enactment of section 1981 was the use of both Black Codes and private power to keep newly emancipated blacks in a

condition equivalent to slavery. See Jones v. Mayer, 392 U.S. at 426-429; General Building Contractors v. Pennsylvania, 458 U.S. 375, 386-388 (1982). Thus, Congress' understanding of the problems faced by former slaves in making and enforcing contracts during the reconstruction era is highly probative of Congress' intent with respect to the coverage of section 1981.

The problems at which section 1981 was directed included more than discrimination in the hiring, firing or promotion of black workers.[14] In the reconstruction period, white plantation

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[14]The primary concern of white landowners was to retain, not to fire or replace, black workers; far from refusing to hire blacks, landowners resorted to a variety of tactics, including threats, violence and patrols, to ensure that blacks stayed in their employ. See, e.g., Sen. Exec. Doc. No. 2, 39th Cong., 1st Sess. 18 (1865) (hereinafter cited as "Schurz Report").

owners continued to need black labor.[15] They simply wanted to maintain the same terms and conditions of employment that existed prior to emancipation.

When it enacted section 1981, Congress had before it massive evidence of efforts by plantation owners to retain former slaves under oppressive terms and conditions. The first detailed account of these new practices and schemes came in a report to the President and Congress by General Carl Schurz. This report played a critical role in the adoption of both the 1866 Act and the Fourteenth Amendment. Jones v. Mayer Co., 392 U.S. at 428. "The report expressed the general view that the South was having difficulty adjusting to the abolition of slavery and that in the absence of

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[15] See, e.g., H.R. Rep. No. 30, Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., Part II, p.4 (1866) (hereinafter cited as "Reconstruction Committee Report").

federal intervention, a substitute for slavery was not unlikely." Memphis v. Greene, 451 U.S. 100, 131-32, n. 4 (1981) (White, J., concurring). General Schurz observed that the former slaveholders "simply adher[ed], as to the treatment of the laborers, as much as possible to the traditions of the old system, even when the relations between employers and laborers had been fixed by contract."[16] Schurz noted that employers attempted to "introduce into that new system [of contractual employment] the element of physical compulsion." He concluded that "[t]he habit is so inveterate with a great many persons as to render, on the least provocation, the impulse to whip a negro almost irresistible."[17]

The former masters were also determined to expend little more for the

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[16] Schurz Report at 19.

[17] Id. at 19-20 (emphasis added).

labor of freedmen than they had for slaves. One Freedmen's Bureau official quoted by Schurz observed:

> Nineteen-twentieths of the planters have no disposition to pay the negro well or treat him well ... To defraud, oppress, and maltreat the freedmen seems to be the principle governing the action of more than half of those who make contracts with them.[18]

Planters were entirely willing to enter into labor contracts with black workers, but sought to require them to "submi[t] to the will of the employer,"[19] and to permit employers to "arrange the matter of compensation according to their tastes."[20]

Schurz appended to his report the

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[18] Id. at 91. The Freedman's Bureau "was especially active" in the field of labor contracts, attempting to obtain "fair" contracts and improved "conditions" for black workers. E.g., J. H. Franklin, Reconstruction After the Civil War 37-38 (1961).

[19] Schurz Report at 51.

[20] Id. at 24.

proposal of a group of Louisiana planters regarding the employment of black workers. Schurz described this plan as "true representations of the ideas and sentiments entertained by large numbers today."[21] The plan did not contemplate racial discrimination in hiring or firing; rather, it called for draconian conditions of employment. Farm laborers were to work a sixty hour week, and "[t]he rate of wages should be fixed--above which no one should be allowed to go."[22] Farm workers could neither leave the plantation, nor receive visitors, without written permission of the proprietor. Corporal punishment could be inflicted "to correct any abuse,"[23] and fines or imprisonment would be imposed on any laborers who were not "respectful in

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[21] Id. at 22.

[22] Id. at 84 (emphasis added).

[23] Id.

tone, manner, and language to their employers."[24]

In the wake of the Schurz report, Congress in early 1866 organized a Joint Committee on Reconstruction to conduct a further investigation. The Joint Committee compiled a detailed record of the circumstances in each of the former rebel states, confirming and elaborating on Schurz's conclusions. Witnesses repeatedly testified that the planters were refusing to pay freedmen a living wage, indeed in some instances refusing to pay them at all,[25] and continued to resort to whipping and other acts of cruelty.[26]

The framers of the 1866 Civil Rights Act were particularly concerned about the

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[24]Id. at 85.

[25]Reconstruction Committee Report, Part II at 17, 52, 54, 56, 61, 83.

[26]Id. at 55, 61, 83.

southern legislation known collectively as the Black Codes, Memphis v. Greene, 451 U.S. at 132 (White, J., concurring); Jones v. Mayer Co., 392 U.S. at 426, 432, 433. But the Black Codes, like the planters, were largely concerned with controlling, directly or indirectly, the terms and conditions under which blacks would be employed, not with preventing blacks from entering into employment contracts. None of the Black Codes prohibited blacks from signing employment contracts, or mandated racial discrimination in hiring, promotions, or dismissals.[27]

Proponents of the 1866 Act denounced those aspects of the Black Codes which directly controlled the terms and conditions of black employment. In his statement opening the debate on the civil

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[27]See Sen. Exec. Doc. No. 6, 39th Cong., 2d Sess. 170-230 (1867) (Laws in Relation to Freedmen).

rights bill, Senator Wilson denounced provisions of a Georgia statutory proposal that "regulates contracts between master and servant, ... [sets] [w]ork hours, from sunrise to sunset, [makes] [t]he servant ... responsible for damaging the master's property [and allows] [t]he employer [to] discharge servants for ... want of respect."[28]

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[28]Cong. Globe, 39th Cong., 1st Sess. 39 (1866). Wilson also warned that the Louisiana legislature was considering a bill governing the conditions of employment. Wilson pointed out that under the Louisiana proposal, "[g]eneral conversation will not be allowed during working hours, ... l[ea]ving home without permission, will be deemed disobedience," subject to fines, "[n]o live stock will be allowed the laborers without the permission of the employer [and for] all lost time from work hours (unless in case of sickness) the laborers shall be charged twenty-five cents per hour." Id.

The Louisiana measure referred to by Senator Wilson, which had in fact been enacted in December 1865, also required farm workers to labor for ten hours a day six days a week, and authorized penalties for "impudence," for "swearing ... to or in the presence of the employer, his family or agent" and for "bad work." S.

(continued...)

Finally, Senator Wilson and others objected to the sanctions which a number of southern states imposed on any freedman who attempted to leave his employer in violation of his labor contract. In a number of states, Wilson observed, a laborer's wages were to be withheld until the end of the season, and all of his earned wages were forfeited to the employer if the laborer quit for

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[28](...continued)
Exec. Doc. No. 6, at 181-182. The South Carolina statute regulating farm labor, objected to by Wilson and members of Congress, see, e.g., Cong. Globe, 39th Cong., 1st Sess. 39 (remarks of Sen. Wilson), 1160 (remarks of Rep. Windom), provided that "the hours of labor, except on Sunday, shall be from sun-rise to sun-set," forbade workers to leave the farm or receive visitors without permission of the planter, and authorized corporal punishment for indolence, for being absent "on two or more occasions without permission," or for "want of respect and civility" to the "planter or his family, guests or agents." S. Exec. Doc. No. 6, at 211-212.

another job.[29] South Carolina and other states, Representative Windom objected, permitted local authorities forcibly to return to his employer any worker who had not fulfilled his contract.[30] The Mississippi law quoted by Senator Wilson provided a bounty to private citizens as well as government officials who summarily returned runaways to their former employers.[31] Such measures, by penalizing any freedman who attempted to quit his job, forced laborers to tolerate whatever abuses their employers might perpetrate.

Thus, Congress in enacting section 1981 was not primarily concerned about refusals to hire or promote blacks, but rather about leaving blacks "in reality

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[29]Cong. Globe, 39th Cong., 1st Sess. 39 (Georgia and Mississippi).

[30]Cong. Globe, 39th Cong., 1st Sess. 1160.

[31]Id. at 39.

in a condition of modified slavery, subject to the old injustice and the old tyranny which characterized their former unhappy condition." Cong. Globe, 39th Cong., 1st Sess. 1152 (1866) (Representative Thayer). Congress wanted to assure "not only that slavery shall be abolished upon the pages of your Constitution, but that it shall be abolished in fact and in deed." Id. The members were concerned that without the protection of the civil rights bill, withdrawal of military rule from the South would leave blacks "practically reduce[d] ... to the condition of slavery." Id. at 1124 (Rep. Cook).[32]

Section 1981 was therefore directed

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[32]See also id. at 504 (Senator Howard) (Congress must not allow blacks to be reduced "to a condition infinitely worse than actual slavery"), 1124 (Rep. Cook) ("it is apparent that under other names and in other forms a system of involuntary servitude might be perpetuated over this unfortunate race"), 1159 (Rep. Windom).

at a variety of practices, including: "white employers who refused to pay their Negro workers";[33] employers who treated black workers with "great harshness and injustice";[34] "planters [who] combine[d] together to compel [freedmen] to work for such wages as their former masters may dictate";[35] laws "compelling the return of the freedmen to his master under the name of employer, and allowing him to be whipped for insolence";[36] and laws setting "[w]ork hours from sunrise to sunset."[37] In order to remedy all of these practices, Congress enacted a comprehensive statute that is broad in

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[33] Id. at 95.

[34] Cong. Globe, 39th Cong., 1st Sess. 1833 (Rep. Lawrence, quoting testimony of Major General Alfred H. Terry, commanding the department of Virginia, taken before the reconstruction committee, March 1866).

[35] Id. at 1160 (Rep. Windom).

[36] Id.

[37] Id. at 39 (Senator Wilson).

scope. Senator Trumbull, the bill's sponsor, described the protection it would afford as "sweeping and efficient." Cong. Globe, 39th Cong. 1st Sess. 43 (1866). The Senator said that with regard to the rights enumerated, "the very object of the bill is to break down all discrimination between black men and white men." Id. at 599 (emphasis added). Senator Howard, another supporter, concluded that, as to the rights enumerated, "there is to be hereafter no distinction between the white race and the black race." Id. at 504.

In the House, Representative Cook argued that with respect to the basic civil rights, including "the right to make and enforce contracts," Congress must provide that "there ... be no discrimination" on grounds of race or

color, id. at 1124.[38] Senator Cowan of Pennsylvania, one of the bill's opponents, believed that section 1981 would confer the right to make and enforce contracts "without any qualification and without any restriction whatever," id. at 1781. This understanding of the breadth of the

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[38]Representative Windom explained the provision's requirement of "absolute equality" with timely examples:

> In other words, it declares that henceforth ... the colored soldier, who has worn the uniform of the Republic and periled his life for its defense, shall have an equal right, nothing more, with the white rebel yet reeking with the blood of our murdered defenders; to make and enforce contracts ... [and that] no discrimination shall be made in favor of traitors, because they are white and have always been petted and pampered by the Government, as against patriots because they are black and have always been held in cruel and degrading bondage.

Cong. Globe, 39th Cong., 1st Sess. 1159 (1866) (emphasis added).

provision was not contradicted by the bill's supporters. See Jones v. Mayer Co., 392 U.S. at 435.

Considered in light of this legislative history, the Fourth Circuit's interpretation of section 1981 is plainly mistaken. If, as the court below believed, section 1981 applies only to discrimination in hiring, firing, and promotions, then the law would not have forbidden most of the practices to which the Thirty-ninth Congress objected. In the face of elaborate schemes to reintroduce slavery by means of oppressive terms and conditions of employment, it is inconceivable that Congress intended only to forbid discrimination in hiring, firing and promotion. Southern planters were all too anxious to hire their former slaves and were quite determined to see that those freedmen did not depart for other

jobs. The 1866 Civil Rights Act was adopted to forbid the introduction of a contract based labor system whose terms and conditions were essentially the same as the old slave system.

The line drawn by the Fourth Circuit between "hiring, firing and promotion" on the one hand, and terms and conditions of employment on the other, would permit, in the modern context, the oppression and exploitation of black workers that Congress in enacting section 1981 wanted to prevent. For example, an employer could have two standard employment contracts, one for whites and one for blacks. White applicants could be offered pleasant, dignified treatment, normal workloads and job assignments consistent with their status. On the other hand, black applicants could be offered an employment contract that provided for them to be subjected to

racial slurs and demeaning scrutiny and to be given much harder and more arduous work than white employees. Under the Fourth Circuit's rule, the offering of two different employment contracts on the basis of race would not violate section 1981, even though the different terms and conditions would discourage blacks from "mak[ing]" a contract with this employer. As long as the employer does not apply an absolute prohibition on contracting with blacks, under the Fourth Circuit's ruling it is free to use any means of discouraging or intimidating blacks from entering into a contract.

The Fourth Circuit's ruling also apparently means that wage discrimination is not actionable under section 1981. In the instant case, plaintiff's claim of salary discrimination was dismissed. Thus, an employer that paid black workers less than white workers doing the same

job would not be found liable under section 1981, notwithstanding that wage discrimination was one of Congress' major concerns when it enacted section 1981. See Cong. Globe, 39th Cong., 1st Sess. at 504, 1160, 1833.[39]

The Fourth Circuit's narrow interpretation would eliminate section 1981's coverage in the areas where its protection and remedies are most needed. Section 1981 provides a "separate, distinct and independent" remedy from

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[39]The exclusion of wage discrimination under the Fourth Circuit's decision illustrates the difficulty of drawing a clear line between those terms of employment that "go to the very existence and nature" of the employment contract and those that do not. To implement the Fourth Circuit's ruling, the federal courts would be faced with the task of determining whether a large variety of employment-related decisions do or do not relate to the "essence" of the contract. The courts will have to decide the status of such matters as transfers (arguably like promotions), training, discipline that does not lead to immediate discharge, harassment that results in constructive discharge and awards of seniority.

Title VII of the Civil Rights Act of 1964. Johnson v. Railway Express Agency, 421 U.S. at 461. Although section 1981 and Title VII of the Civil Rights Act of 1964 both prohibit racial discrimination in employment,[40] section 1981 covers additional types of discrimination that are not prohibited by any other federal statute and provides valuable rights and procedures that are not available under Title VII.

The Seventh Amendment right to a jury trial applies to claims brought under section 1981,[41] while Title VII

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[40]Section 1981 is directed at racial discrimination in all types of contracts, including employment contracts, while Title VII is limited to employment discrimination, but covers such discrimination on the basis of religion, sex and national origin, as well as race and color, see 42 U.S.C. § 2000e-2.

[41]In Curtis v. Loether, 415 U.S. 189, 194 (1974), the Court held that the Seventh Amendment applies to an action in federal court to enforce a civil rights statute that creates legal rights and

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claims are tried to the court. In addition, the remedies available under section 1981 are broader than those authorized by Title VII. Because of these differences in remedy, section 1981's prohibition of discrimination in the terms and conditions of employment, particularly racial harassment, is critically important. Title VII provides only equitable relief, which means that the only monetary remedy available under that statute is lost salary or wages.[42] Discrimination in the terms and conditions of employment, such as racial harassment, may not give rise to any monetary claim for backpay. In many

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[41](...continued)
remedies. The right to a jury trial applies under § 1981 because that section affords plaintiffs both equitable and legal relief, including compensatory and, in some cases, punitive damages. Johnson v. Railway Express, 421 U.S. at 460.

[42]E.g., Hunter v. Allis-Chalmers, 797 F.2d at 1421.

cases of such discrimination, the only relief available under Title VII will be an injunction that simply reiterates the command of the statute. Often, that relief will not be a sufficient deterrent to harassment.

Section 1981 authorizes compensatory and punitive damages, in addition to backpay and the other types of equitable relief available under Title VII. Johnson v. Railway Express, 421 U.S. at 460. Because racial harassment is often an egregious form of discrimination, compensatory damages for mental suffering and punitive damages are particularly appropriate in many of these cases. The availability of actual and punitive damages can provide an effective deterrent and help to rid the workplace of this persistent form of

discrimination.[43]

Section 1981's protection against discrimination in the terms and conditions of contracts is vitally important in areas other than employment. Section 1981 provides a cause of action to remedy discrimination in the right to contract for other types of benefits. For example, in Runyon v. McCrary, the Court held that section 1981 prohibits discrimination by private schools. 427 U.S. at 172-173. A ruling that section

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[43]See, e.g., Block v. R. H. Macy & Co., Inc., 712 F.2d 1241, 1243, 1245-48 (8th Cir. 1983) (Title VII and § 1981 claims for discharge and racial harassment; $20,000 in actual and $60,000 in punitive damages awarded, of which only $7,598 was back pay under Title VII); Fisher v. Dillard University, 499 F. Supp. 525, 537 (E.D. La. 1980)(Title VII and § 1931 claims of unequal pay; $11,127 in backpay, $50,000 in compensatory damages and $10,000 in punitive damages awarded). Cf. Webb v. City of Chester, Ill., 813 F.2d 824, 836 (7th Cir. 1987)(§ 1983 sex discrimination claim for discharge; $20,250 awarded for embarrassment and humiliation; $9,750 for lost wages).

1981 does not encompass discrimination in the terms and conditions of contracts would mean that many victims of such discrimination would have no remedy. Under the Fourth Circuit's decision, black students could obtain admission to the programs of private educational institutions that receive no federal financial assistance, but the students could then be racially harassed or segregated.

II.

DISCRIMINATORY INTENT CAN BE CONCLUSIVELY ESTABLISHED WITHOUT PROOF OF PLAINTIFF'S SUPERIOR QUALIFICATIONS

The district court and the court of appeals each relied upon a different ground in attempting to justify the "superior qualifications" jury instruction. The district court believed that proof that the plaintiff's qualifications were superior to those of the selectee was necessary for the

plaintiff to establish a prima facie case of discrimination. The court of appeals reasoned that once the employer articulates the selectee's superior qualifications as a defense, the only way that the plaintiff can rebut the employer's assertion and prevail on the ultimate question of discriminatory intent is to prove that her own qualifications are superior.

Both courts below erred by looking at the wrong question. The ultimate issue is not whether plaintiff's qualifications are superior to those of the selectee. The factual question to be decided is whether the employer acted with a discriminatory motive. United States Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

Evidence of discriminatory intent "might take a variety of forms." Furnco Construction Corp. v. Waters, 438 U.S.

567, 578 (1978).[44] Where the employer articulates the selectee's alleged superior qualifications as the reason for its decision, the plaintiff may still prevail without proving that her own qualifications are superior. In that situation, the plaintiff may prevail either by showing that her own qualifications are superior or by convincing the factfinder that the employer did not actually rely on a comparison of the candidates' qualifications in making its decision. The plaintiff's burden is to prove that the employer's reason is pretextual. She may do this in either of two ways:

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[44]The method of proof was "never intended to be rigid, mechanized, or ritualistic." Furnco, 438 U.S. at 577. "The facts necessarily will vary in Title VII cases, and the specification ... of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, n.13 (1973).

"directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

The Fourth Circuit's "superior qualifications" requirement relies on the Court's conclusion in Burdine that "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." 450 U.S. at 259.[45] Yet, this statement from the Burdine opinion demonstrates why the "superior qualifications" rule is erroneous. Admittedly, the mere fact that an employer has chosen a white when there were two equally qualified candidates does not by itself establish

[45] See Pet. App. at 20a.

discrimination. However, the stipulation that "the decision is not based upon unlawful criteria" indicates that the plaintiff must be afforded an opportunity to prove that the decision was in fact based on discrimination.

A. The Fourth Circuit's Ruling Eliminates At Least Four Ways By Which the Plaintiff May Prove Discriminatory Intent Without Establishing Her Superior Qualifications

In this case, the "superior qualifications" instruction prevented the jury from considering whether the totality of plaintiff's evidence established discrimination. A number of methods by which a plaintiff may establish discriminatory intent are well-established in the federal courts. In appropriate circumstances, any single type of evidence may be sufficient to permit the factfinder to make the ultimate finding of discrimination. In reality, the plaintiff will most often

rely on a combination of different types of evidence, each of which sheds light on the defendant's intent from a different perspective. Thus, it is the totality of the evidence that paints a picture of the defendant's state of mind.[46]

1. Overt policy of discrimination.

One type of evidence which may alone support a finding of discriminatory intent is an overt policy of discrimination. In Trans World Airlines v. Thurston, 469 U.S. 111 (1985), the Court unanimously concluded that a written, overt policy of age discrimination was conclusive proof of discriminatory intent. This evidence operated to shift the burden of proof to the defendant to show that the plaintiff

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[46]E.g. United States Postal Service v. Aikens, 460 U.S. 711, 714-16 (1983); Pullman-Standard v. Swint, 456 U.S. 273, 279, 281-82, 291 (1982); McDonnell Douglas, 411 U.S. at 804-805.

was not the victim of the policy.[47] Yet, under the Fourth Circuit's ruling, the plaintiff cannot prevail even if she introduces uncontroverted, direct evidence of the employer's discriminatory intent. An admission by the employer's witness or a written statement of discriminatory intent would not suffice to rebut a mere articulation by the employer that the selectee was more qualified than the plaintiff. This ruling eliminates the overt policy as a method of proving discriminatory intent and is directly contrary to Thurston.[48]

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[47]The Court ruled in Thurston that the method of proof established in McDonnell Douglas does not apply in cases where the plaintiff relies on direct evidence. 469 U.S. at 121. See also Bell v. Birmingham Linen Service, 715 F.2d 1552, 1556-1557 (11th Cir. 1983), cert. denied, 104 S.Ct. 2385 (1985).

[48]Plaintiff's counsel specifically argued to the district court that the "superior qualifications" jury instruction is improper where the plaintiff introduces direct evidence of

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The plaintiff in this case introduced evidence that the employer had an overt policy of discrimination. The admission by the company's own witness that the defendant's President "didn't want to hire any blacks or women," TR 4-89, is equivalent to the facial evidence of discrimination in Thurston. The jury could reasonably conclude that this admitted policy applied to promotions as well as hiring. The district court should not have instructed the jury that plaintiff had the burden of proving her superior qualifications. Instead, the court should have charged that, if the jury found on the basis of direct evidence that the company had a policy of discrimination in promotions, the burden would shift to the employer to prove that, even in the absence of the

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48(...continued)
discriminatory intent. JA 72-73.

policy of discrimination, plaintiff would not have received the promotion in question.

2. Inferential proof of a pattern of discrimination.

In Teamsters v. United States, 431 U.S. 324, 335, n.15, 358 n.44 (1977), the Court ruled that the plaintiff may establish a pattern and practice of discrimination through circumstantial evidence. The evidence in that case included statistical analyses of the employer's hiring and assignment decisions, anecdotal evidence of the treatment of individual minority workers and historical evidence of discriminatory practices. Id. at 336-340.

Although Teamsters involved an allegation of a company-wide pattern of discrimination against a class of minority workers, the method of proof used in that case is also applicable to

an individual claim.[49] Plaintiff in the instant case introduced evidence analogous to that presented in Teamsters. Although the small size of the defendant's work force did not permit a statistical analysis of its promotion practices, Patterson introduced other evidence sufficient to support a finding of a pattern and practice of discrimination. Patterson showed that the company had no black supervisors, accounting employees or secretaries ever. She showed that in its entire history, the company had only three black employees and that they were all file clerks. She introduced evidence

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[49]The Court in Thurston, an individual, non-class action case, cited Teamsters to support the conclusion that direct evidence of a policy of discrimination shifts the burden of proof to the employer. 469 U.S. at 121. The Court has also relied on the principles announced in Teamsters in its decisions in other individual, non-class action cases. E.g. Aikens, 460 U.S. at 714, n.3; Burdine, 450 U.S. at 254.

sufficient to support the finding that whites with lesser qualifications were transferred or hired into the secretarial and accounting positions. She showed that when the company finally decided to hire its first black employee some eight years after passage of Title VII, the idea was so traumatic that it required special meetings and counseling.[50] She also introduced evidence sufficient to support a finding of racial harassment.

When a pattern of discrimination is shown, the only additional evidence necessary to establish an individual claim is that the "alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination."

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[50]Stevenson testified that prior to Patterson's employment, he held a staff meeting to explain "that we had not had black employees before, and the white people in the past had not had any experience working with black people." TR 3-96 to 3-97.

431 U.S. at 362. Moreover, an application is not necessary if the employer's discrimination discouraged the worker from applying. Id. at 365-66.[51] Clearly, proof of the plaintiff's superior qualifications is not necessary for the plaintiff to make out a prima facie case under this method of proof.

3. Remarks betraying racial prejudice.

Remarks by a key decisionmaker that reflect racial prejudice or racially stereotypical thinking are directly

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[51]Patterson's proof that she was never able to find out about vacancies in order to apply is sufficient to satisfy this requirement, particularly since she expressed a general interest in promotional opportunities. See JA at 40; Box v. A & P Tea Co., 772 F.2d 1372, 1376, 1377 (7th Cir. 1985), cert. denied, 106 S.Ct. 3311 (1986); Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1132-34 (11th Cir. 1984); Ostroff v. Employment Exchange, 683 F.2d 302, 304 (9th Cir. 1982); Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 761, 762 (9th Cir. 1980).

probative of the employer's state of mind in making personnel decisions. E.g. Miles v. MNC Corp., 750 F.2d 867, 874 (11th Cir. 1985); Van Houdnos v. Evans, 807 F.2d 648, 652-653 (7th Cir. 1986). Such remarks alone can support an inference of discriminatory intent.[52] For example, in Miles v. MNC Corp., 750 F.2d at 874, the Eleventh Circuit held that a single racial slur, if believed by the factfinder, would be sufficient to establish the existence of a discriminatory motive that would shift the burden of proof to the defendant. In Miles, a former employee of the defendant testified that when she asked the hiring official "why they didn't have any blacks," he replied: "Half of them weren't worth a shit." Id. at 874. The

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[52]"As in any lawsuit, the plaintiff [in an employment discrimination case] may prove his case by direct or circumstantial evidence." Aikens, 460 U.S. at 714, n.3.

court of appeals ruled that the trier of fact should first determine whether it believed this evidence. Id. at 875. If so, the existence of a discriminatory motive would be established. The burden of proof then would shift to the defendant to prove that it would have made the same decision in the absence of the illegal motive. Id. at 875-876.

The facts of the instant case are almost identical to those in Miles v. MNC Corp. Both cases involved a racial slur that directly denigrated the work abilities of blacks. The statement in this case that blacks are "slower by nature" than whites is almost identical to the statement in Miles. In both cases the remark was made by the decisionmaker involved in the decision challenged by the plaintiff. Moreover, the remark in this case is consistent with a number of other statements made by defendant's

President which reflect racial prejudices and policies. By requiring proof of the plaintiff's superior qualifications, the district court erroneously prevented the jury from considering whether this evidence established defendant's discriminatory intent.

4. Proof of pretext.

In McDonnell Douglas v. Green, 411 U.S. 792 (1973), and subsequent cases,[53] the Court developed a model of proof of discriminatory intent based on indirect evidence.[54] The McDonnell Douglas line

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[53]Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal Service v. Aikens, 460 U.S. 711 (1983).

[54]Although this method of proof was developed in the context of claims under Title VII, it would seem equally applicable to the identical issue of individual disparate treatment under section 1981. E.g., Ramsey v. American

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of cases recognizes that direct evidence of discriminatory intent, such as that discussed above, is rarely available. "There will seldom be 'eyewitness' testimony as to the employer's mental processes." Aikens, 460 U.S. at 716. Moreover, these cases make clear that proof of a general, widespread pattern and practice of discrimination under the Teamsters model is not necessary for an individual plaintiff to prevail on a claim related to an adverse action in a specific situation.

The McDonnell Douglas line of cases focuses on the employer's reasons for making specific personnel decisions. Rather than directly seeking to prove the employer's state of mind, this method of proof seeks to eliminate all of the other

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54(...continued)
Air Filter Co., 772 F.2d at 1307; Carter v. Duncan-Huggins, Ltd., 727 F.2d at 1232.

possible reasons for the employer's decision, leaving discrimination as the only remaining explanation. "[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race." Furnco, 438 U.S. at 577.

The model utilizes a three-stage method of proof. The plaintiff first has the burden of establishing a prima facie case. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 252-53. Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to "produc[e] evidence" that its decision was based on "a legitimate, nondiscriminatory reason." Burdine, 450 U.S. at 254. The defendant's burden is

one of production, not proof. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and the factual inquiry proceeds to a new level of specificity." Burdine, 450 U.S. at 255. The plaintiff must then be provided a full and fair opportunity to demonstrate that the asserted reason is a pretext for discrimination. "This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." Id. at 256.

Logic supports the conclusion that when the plaintiff relies on the McDonnell Douglas approach to prove intent, an absolute requirement that she prove her superior qualifications is improper, even where the employer articulates the selectee's superior qualifications as the purported reason

for its decision. Under the McDonnell Douglas method of proof, plaintiff's burden is to demonstrate that the "proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. The plaintiff may be able to discredit the employer's reason without proving that her qualifications are superior.

At least two factual assertions are inherent in the employer's articulation that the selectee's superior qualifications were the reason for its decision. One factual assertion is that the selectee's qualifications are in fact (or were genuinely perceived to be) superior, rather than equal or inferior to those of the plaintiff. The second assertion is that the employer actually relied on this disparity in qualifications in making its decision.

Obviously, one way to discredit the employer's proffered explanation is to

show that it is untrue because plaintiff is the more qualified candidate. This is not the only way to accomplish this result, however. There are at least three ways through which the plaintiff can meet her burden of discrediting the proffered explanation that do not involve proof of her superior qualifications. First, the plaintiff could convince the factfinder that her qualifications are equal (or were perceived as equal) to those of the selectee. For example, in Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 814-15 (1983), the court found the defendant's explanation that the selectee's qualifications were superior to be a pretext, because the plaintiff proved that she was at least as qualified for the position. Thus, under Hawkins, in the appropriate circumstances a showing of equal qualifications would be sufficient to prove the Title VII claim

because it would demonstrate that the decision was made for reasons other than the candidates' relative qualifications.

Second, the plaintiff could convince the factfinder that the employer more likely than not did not rely on qualifications in making its decision. The plaintiff might cast doubt on the employer's reliance on alleged superior qualifications by showing that the employer normally promotes on the basis of seniority. Or, as in Joshi v. Florida State University Health Center, 763 F.2d 1227, 1235 (11th Cir. 1985), the plaintiff could prove that the relative qualifications of the selectee could not be the actual reason for the defendant's refusal to hire plaintiff, since the plaintiff was not actively considered for the position.

Third, the plaintiff might simply convince the factfinder that the asserted

reason is not credible. As the ultimate judge of credibility, the factfinder in making this determination could rely on any number of factors, from direct evidence of discriminatory motive to inconsistencies in the testimony to demeanor and inflection.[55]

The Court in McDonnell Douglas rejected any restriction on the ways in which a plaintiff may prove pretext and thus prevail on the ultimate question of discrimination. The Court in that case suggested a variety of types of evidence

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[55]See Anderson v. Bessemer City, 470 U.S. 564, 575 (1985) ("variations in demeanor and tone of voice ... bear so heavily on the listener's understanding ... of and belief in what is said"; "[d]ocuments or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it"). See also Kilgo v. Bowman Transportation, 789 F.2d 859, 875 (11th Cir. 1986)(employer's articulated reason found "unconvincing" because the reason constantly shifted).

that might be offered on the ultimate question of intent. Only one of the types of evidence mentioned by the Court involved a direct comparison between the plaintiff and the selectee with respect to the factor articulated by the employer as the decisive factor.[56] The Court did not indicate that this type of comparative evidence is required; only that such evidence would be "[e]specially relevant." 411 U.S. at 804. "Other evidence that may be relevant to any showing of pretext includes facts as to

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[56]The Court concluded: "Especially relevant to [a showing that the employer's stated reason was a pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired." 411 U.S. at 804. The treatment of persons with comparable misconduct in McDonnell Douglas is analogous to evidence of plaintiff's superior qualifications in a case where the employer articulates the selectee's superior qualifications as the reason for its decision. In each case, the evidence goes to a direct comparison of plaintiff and the selectee on the articulated factor.

the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment." McDonnell Douglas, 411 U.S. at 804-805.

The "superior qualifications" instruction prevented the jury in this case from considering whether plaintiff had proved that the employer's articulated reason was not worthy of credence.[57] Plaintiff introduced

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[57]The jury instruction in the instant case had an additional flaw. The court charged the jury that it was required to find both that plaintiff's race was "the real reason that she did not receive the promotion," and that plaintiff was more qualified than the selectee. JA 40-41, 42-43. However, these are alternative ways to prove pretext. E.g., Burdine, 450 U.S. at 256. If the plaintiff discredits the employer's articulated reason, no further proof of intent is required. Id.; Aikens, 460 U.S. at 716; id. at 717-718 (Blackmun, J., joined by Brennan, J., concurring).

substantial evidence to support such a conclusion. In addition to the direct and circumstantial evidence discussed above, Patterson introduced evidence from which the jury could have concluded that her qualifications were at least equal to those of Williamson.[58] Patterson also introduced evidence that Williamson's qualifications resulted from training that Patterson was denied because of her race. TR 1-48 to 1-49, 3-187 to 3-188.[59]

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[58]Patterson had a college degree, while Williamson had taken only a few college courses. TR 1-47 to 1-48. Patterson also had more seniority with the company. Id. One of Williamson's supervisors severely criticized Williamson's job performance and knowledge of accounting functions. TR 1-159, 2-190 to 2-191.

[59]The district court concluded that "plaintiff offered evidence tending to show that she had not been trained for the job of accountant intermediate because of her race and was thus denied the promotion because of her race." JA 41. However, the court related the allegation of discriminatory training to Patterson's burden of proving that race was the real reason for the selection of

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Finally, Patterson introduced evidence suggesting that she was not actually considered for the promotion and that the employer was not fully aware of her qualifications. TR 3-179 to 3-180, 4-27.[60]

B. Proof of Superior Qualifications Is Not Necessary To Establish a Prima Facie Case

The district court justified the "superior qualifications" jury instructions on the ground that this element of proof is necessary to establish a prima facie case of

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[59](...continued)
Williamson, and did not instruct the jury that a finding in favor of plaintiff on the training allegation would negate the requirement that she prove that her qualifications were superior. Id.

[60]See, e.g., Joshi v. Florida State University Health Center, 763 F.2d 1227, 1235 (11th Cir. 1985); Eastland v. Tennessee Valley Authority, 704 F.2d 613, 625-26 (11th Cir.), modified on other grounds, 714 F.2d 1066 (1983), cert. denied, 465 U.S. 1066 (1984); Lowery v. WMC-TV, 658 F. Supp. 1240, 1259, vacated on other grounds, 661 F. Supp. 65 (W.D. Tenn. 1987).

employment discrimination. As discussed above, it is not necessary for plaintiff to establish her superior qualifications to prevail on the ultimate question of discriminatory intent. It follows that the plaintiff cannot be required to meet this burden at the prima facie case stage. Moreover, once the case has gone to the factfinder on the ultimate question of intent, it is not necessary to consider whether the plaintiff had established a prima facie case. Aikens, 460 U.S. at 715-716. Nonetheless, because the jury instruction in this case was based on the district court's understanding of the prima facie case requirements, petitioner will address below the issue of plaintiff's burden at the prima facie case stage.

Requiring the plaintiff to prove her superior qualifications at the prima facie case stage is logically

inconsistent with the theory behind the McDonnell Douglas method of proof. The purpose of the prima facie case is not to ascertain whether the plaintiff has proved her entire case. Rather, the purpose is to determine whether the plaintiff has proved enough to make it fair to ask the employer to assist the plaintiff in further development of the case, by focusing the issue and saving time for everyone.[61] The employer has

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[61]The McDonnell Douglas tripartite method of proof is designed "to bring the litigants and the court expeditiously and fairly to [the] ultimate question" of discriminatory intent. Burdine, 450 U.S. at 248. The major purpose of the prima facie case in this situation is not to "hel[p] the judge to determine whether the litigants have created an issue of fact to be decided by the [factfinder]." Burdine, 450 U.S. at 254, n.8. Rather, "the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Id. The employer's intermediate burden of articulation operates simply to "frame the issue with sufficient clarity." Id. at 255. Given the wide variety of

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superior access to information about the actual reasons for its decision, and in many cases only the employer can specify which qualifications it considered important or how it weighed the different factors, such as education and experience, that comprise a candidate's qualifications.

Under the method of proof adopted in McDonnell Douglas and Burdine, the plaintiff bears the burden of discrediting only the reason or reasons articulated by the defendant. Comparative qualifications may not even be one of

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[61](...continued)
reasons that might possibly have motivated a particular decision, it makes sense, once the plaintiff has established that she applied, met the minimum qualifications and was rejected for a position, to require the employer to narrow the focus by identifying its purported actual reason.

those reasons.[62] For example, in McDonnell Douglas, the employer met its burden of articulation by introducing evidence that its decision not to rehire plaintiff was based on plaintiff's prior misconduct. The relative qualifications of plaintiff and the persons who were rehired never became an issue in the case. Yet, if the plaintiff had been required to prove his superior qualifications at the prima facie case stage, the case might have been dismissed before he had "a full and fair opportunity" to introduce evidence on the

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[62]Although it is socially desirable that employers make hiring and promotion decisions on the basis of qualifications, McDonnell Douglas, 411 U.S. at 801, it is common knowledge that other factors, such as prior employment, e.g., Furnco, 438 U.S. at 570, disciplinary record, attendance record, recommendations and seniority, often are influential or determinative in hiring or promotion decisions. Racial discrimination also frequently is the real reason behind employment-related decisions.

factual questions that were actually relevant.

The McDonnell Douglas line of cases indicates that, with respect to qualifications, the plaintiff's initial burden is to establish only that she meets the minimum, nondiscriminatory qualifications for the job at issue. In McDonnell Douglas, the plaintiff's burden at the prima facie stage was to show that he was "qualified." 411 U.S. at 802. The plaintiff met this burden by proving that his past work performance had been "satisfactory." Id. The Court did not even consider how the performance and experience of the applicants who were hired compared to that of the plaintiff.

In Burdine, the Court noted that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." 450 U.S. at 253. As in McDonnell Douglas, the Court had no

difficulty in concluding that the plaintiff had met this burden by showing that she was "a qualified woman." Id. at n. 6. The Court again did not consider whether the plaintiff was MORE qualified than the selectee. Yet, the court of appeals had ruled that the plaintiff met the qualification requirement of the prima facie case, on the ground that she had been considered for the open position and the selecting official "refused to state that plaintiff was not qualified ... [but] merely asserted that Watts was better qualified." Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563, 567, n.6 (5th Cir. 1979) (emphasis added). Moreover, the issue directly raised and decided in Burdine was whether, in order to rebut the plaintiff's prima facie case, the defendant bears the burden of proving that the qualifications of the plaintiff

are inferior to those of the selectee. If the Court's finding that plaintiff satisfied the prima facie case requirement meant that plaintiff had proved her superior qualifications, then the question of the defendant's burden to prove that she was inferior would have never arisen.

Similarly in Furnco, 438 U.S. at 576, the Court concluded that the plaintiffs established a prima facie case by proving that: "they were members of a racial minority; they did everything within their power to apply for employment; [the defendant] has conceded that they were qualified in every respect for the jobs which were about to be open; they were not offered employment ...; and the employer continued to seek persons of similar qualifications." (Footnote omitted). The Court did not require proof that the plaintiffs were MORE

qualified than the persons actually hired, but only that the plaintiffs were "fully qualified." Id. at 570. The defendant's contention that its hiring practice resulted in "highly qualified," "experienced," "skilled and competent," workers, id. at 571-572, was properly considered at the second and third stages of the litigation, and not as an aspect of the prima facie case. Id. at 576-80.

The lower federal courts are unanimous in concluding that proof that the plaintiff possesses the minimum qualifications is all that is required to satisfy the qualifications element of the McDonnell Douglas prima facie case.[63]

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[63]Seventh Circuit: Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132, 134-35 (1985).

Eighth Circuit: Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 813 (8th Cir. 1983).

Ninth Circuit: Foster v. Arcata Associates, Inc., 772 F.2d 1453, 1460 (continued...)

In several recent cases, the Court of Appeals for the Fourth Circuit appears to have misunderstood the role of the prima facie case and has placed unduly harsh burdens of proof on the plaintiff. The district court's ruling that the plaintiff must establish her superior qualifications in order to make out a prima facie case may have been based on this same fundamental misconception. This misunderstanding, which seems to be gaining momentum, will, if not corrected,

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[63](...continued)
(9th Cir. 1985), cert. denied, 106 S. Ct. 1267 (1986); Lynn v. Regents of University of California, 656 F.2d 1337, 1344-45 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982).

Tenth Circuit: Burrus v. United Telephone Co., 683 F.2d 339, 342-43 (10th Cir.), cert. denied, 459 U.S. 1071 (1982);

District of Columbia Circuit: Mitchell v. Baldridge, 759 F.2d 80, 85 (D.C. Cir. 1985).

result in improper jury instructions and improper dismissals of meritorious claims.

Relying on language to the effect that the prima facie case "give[s] rise to an inference of unlawful discrimination,"[64] the Fourth Circuit has required a higher level of proof at the prima facie case stage than is mandated under McDonnell Douglas and Burdine.[65] The fundamental misunderstanding that has led the Fourth Circuit into error is the

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[64]E.g. Burdine, 450 U.S. at 253.

[65]See, e.g. Robinson v. Montgomery Ward, 823 F.2d 793 (4th Cir. 1987), petition for cert. filed, No. 87-801 (November 12, 1987); Lytle v. Household Mfg. Inc., No. 86-1097, slip op. (October 20, 1987); Holmes v. Bevilacqua, 794 F.2d 142 (4th Cir. 1986) (en banc); Moore v. City of Charlotte, 754 F.2d 1100 (4th Cir.), cert. denied, 105 S.Ct. 3489 (1985). See also Foster v. Tandy Corp., 44 Fair Empl. Prac. Cases 1518 (September 16, 1987) (judgment notwithstanding the verdict entered, overturning jury verdict in favor of plaintiff).

assumption that it is the plaintiff's prima facie case alone that supports an inference of discrimination.[66] The Court has repeatedly made clear that this is an incorrect assumption. Rather, the inference of discrimination arises from the combination of the prima facie case and the employer's failure to provide an explanation for its decision. "A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume that these acts, if otherwise unexplained, are more likely than not based on the consideration of

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[66]The Court in Holmes v. Bevilacqua reasoned that the plaintiff's proof that he was a minority, that he was qualified, that he applied and that he was rejected in favor of a white person, was not sufficient "to justify the presumption of discrimination." 794 F.2d at 146-147. Similarly, in Moore, the Court reasoned that the McDonnell Douglas factors did not support "the finding of intentional discrimination." 754 F.2d 1110.

impermissible factors." Furnco, 438 U.S. at 577.

Under the McDonnell Douglas method of proof, the employer's asserted reason for its action, or the employer's failure to produce such a reason, often is the central piece of evidence. The employer's inability even to articulate a reason for its decision speaks volumes. Because the lack of any articulated non-discriminatory reason is such strong proof of discrimination, it is entirely appropriate that the rest of plaintiff's evidence make only a supporting contribution to the inference of discrimination.

Thus, the prima facie case standard, as applied in McDonnell Douglas and Burdine, is justified by the central importance of the employer's articulated reason, the efficiency gained by requiring the employer to come forward

with this reason at an early stage of the trial and the relative ease with which the employer can meet its burden of rebutting the prima facie case. It is neither necessary nor appropriate to use the prima facie case as a vehicle for wholesale dismissal of allegedly non-meritorious cases. Unless the employer is unable to articulate a legitimate, non-discriminatory reason, the plaintiff's case is not sufficiently far enough along at this point to make a judgment whether there is sufficient evidence to raise a triable issue. By definition, the bulk of plaintiff's evidence of intent will come at the pretext stage, after the issues have been focused by the employer's articulation. Thus, the Court should reaffirm that the McDonnell Douglas and Burdine criteria still govern proof of a prima facie case.

Conclusion

For the reasons stated, the decision of the court of appeals should be reversed and the case should be remanded for a new trial.

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